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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2767/2016*, **

Communication submitted by:	Lydia Cacho Ribeiro (represented by Article 19)
Alleged victim:	The author
State party:	Mexico
Date of communication:	13 October 2014
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 9 May 2016 (not issued in document form)
Date of adoption of Views:	17 July 2018
Subject matter:	Detention of a journalist for defamation and calumny following publication of a book about a child sexual exploitation ring
Procedural issues:	Exhaustion of domestic remedies, incompatibility with the provisions of the Covenant, insufficient substantiation of the complaint
Substantive issues:	Prohibition of torture and ill-treatment, gender equality, prohibition of arbitrary detention, treatment of persons deprived of their liberty, due process guarantees, *nullum crimen*, freedom of expression
Articles of the Covenant:	2 (3), 3, 7, 9, 10, 12, 14 (1), 15 (1) and 19
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

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1.1 The author of the communication is Lydia Cacho Ribeiro, a national of Mexico born in 1963. She claims that the State party has violated her rights under articles 2 (3), 3, 7, 9, 10, 12, 14 (1), 15 (1) and 19 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 15 June 2002.

1.2 On 21 November 2016, the Special Rapporteurs on new communications and interim measures, acting on behalf of the Committee, rejected the State party's request that the admissibility of the communication be considered separately from its merits.

The facts as submitted by the author

2.1 The author is a journalist, human rights defender and founder of the Centro Integral de Atención a la Mujer (Integrated Support Centre for Women), an organization devoted to providing protection and support for victims of sexual violence, based in Cancún, State of Quintana Roo. In March 2005, using accounts given by a number of victims who had received assistance at the Centre, the author published a book entitled *Los Demonios del Edén. El poder que protege a la pornografía infantil* (The Demons of Eden: the Power behind Child Pornography), in which she revealed the existence of a corruption and child exploitation ring.[1] In the book, the author described the involvement in the ring, as principals or accessories, of various public authorities and business leaders, including José Kamel Nacif Borge, a prominent textile industrialist and owner of one of the largest fortunes in Mexico.

Criminal proceedings against the author, detention and torture of the author

2.2 In July 2005, Mr. Nacif filed a complaint against the author for defamation and calumny in the State of Puebla.[2, 3] As a result of this complaint, the public prosecution service opened a preliminary investigation[4] on 12 July 2005; the author was not informed of the investigation. On 10 August 2005, the public prosecution service brought criminal proceedings before the Fifth Criminal Court of the State of Puebla. On 15 September 2005, the Court declined jurisdiction to hear the case *ratione loci*. On 10 October 2005, the public prosecution service again brought criminal proceedings before the Court, which, on 12 October 2005, opened a criminal case and issued a warrant for the author's arrest.

2.3 On 16 December 2005, the author was detained outside the offices of the Centro Integral de Atención a la Mujer by a group of at least 10 persons, including 3 judicial police officers of the State of Puebla, 2 police officers of the State of Quintana Roo and at least 5 private agents employed by Mr. Nacif. Four cars, one belonging to a company owned by Mr. Nacif, were used in the operation. No arrest warrant was shown to the author. The author was taken to the premises of the then Office of the Attorney General (now the Office of the Prosecutor General) of the State of Quintana Roo, where she was held in incommunicado detention.

2.4 That same day, the author was taken by car to the State of Puebla; she was accompanied by judicial police officers of that State, all of whom were men. As she was getting into the vehicle, one of the officers grabbed her by the hair and shoved her into the

[1] The book included the accounts of interviewed victims and was published with their consent.

[2] Mr. Nacif's state of residence.

[3] Article 357 of the Social Protection Code of the Free and Sovereign State of Puebla, which was in force at the time of the events, provided: "Defamation consists in communicating, to one or more persons, the false imputation to another person or entity of an act that can cause dishonour, discredit, prejudice, or expose that person or entity to the contempt of another." Article 358 stated: "The offence of defamation shall be punishable by a prison term of from 6 months to 4 years and a fine of from 10 to 100 days of wages." Article 362 defined and criminalized calumny in the following terms: "A prison term of from 6 months to 4 years and a fine of from 10 to 100 days of wages shall be imposed on: I. Anyone who imputes to another a specific act defined as an offence under law, if such act did not occur or if the person to whom it is imputed is innocent; II. Anyone who presents false claims, accusations or complaints, such being understood as those in which the perpetrator imputes an offence to a particular person knowing that such person is innocent or that the offence has not been committed."

[4] A pretrial investigation carried out to determine whether proceedings should be brought before the criminal courts.

back of the car. During the approximately 1,500 km journey, which lasted about 20 hours, she was denied food and the medication she needed to treat her bronchitis and was allowed to go to the bathroom only once. She was only allowed to make a brief telephone call to her partner, which was cut off when the author reported that she was being accompanied by male police officers. She was not allowed to sleep but was forced to remain seated with her hands behind her back, under threat of being handcuffed. She was also subjected to psychological and physical torture, including sexual advances and touching, death threats and verbal and physical violence. On several occasions, one of the officers inserted a gun into the author's mouth, moving it around in circles and making sexual comments. The same agent later ran the gun over the author's breasts, spread her legs apart and pointed the gun at her genitals. He then pushed the gun hard against the author's abdomen and began to unzip her trousers, at which point the author wet herself uncontrollably, causing the officer to shout at her that she was a "pig".

2.5 On 17 December 2005, on her arrival at the jail cells of the Office of the Attorney General of the State of Puebla, the author was taken to a room where an individual shoved her up against the wall, opened her blouse and touched her breasts. He then grabbed her violently by the hair and pushed her head against the wall. Later that day, the author was brought before the Fifth Criminal Court of the State of Puebla, which ordered her placement in pretrial detention at the Social Rehabilitation Centre in Puebla. During her pretrial detention, the author was subjected to further threats and psychological and physical violence. On the same date, her bail was paid and the author was released.

2.6 On 23 December 2005, the Fifth Criminal Court of Puebla issued a detention order against the author for defamation and calumny. On 27 December 2005, the author appealed the detention order to the High Court of Justice of the State of Puebla. On 13 January 2006, the Court ruled that the calumny charge against the author was unfounded and amended the order, such that the proceedings against her related solely to the offence of defamation.

2.7 On 10 January 2006, the author filed an application for a declaration of lack of jurisdiction with the Fifth Criminal Court of the State of Puebla, arguing that the competent courts to hear the case were those of the Federal District (now Mexico City) because the publication, presentation and sale of the book had taken place in Mexico City. On 18 January 2006, the Fifth Court ruled that it had no jurisdiction to hear the case and that the competent courts were those of the State of Quintana Roo.[5] On 22 September 2006, the author filed a new application for a declaration of lack of jurisdiction, arguing in favour of the competence of the Federal District courts. On 4 October 2006, the First Criminal Court of Quintana Roo ruled that it had no jurisdiction to hear the case and referred it to the Federal District.

2.8 On 22 December 2006, the Fourth Criminal Court of the Federal District dismissed the case on the grounds that the offence of defamation did not exist in that entity and ordered the author's release.

Investigation procedure by the Supreme Court of Mexico

2.9 On 21 December 2005, an article was published in the press in which Mr. Nacif acknowledged the support received from the Governor of the State of Puebla in connection with the author's arrest.[6] On 14 February 2006, recordings of telephone conversations

[5] The Fifth Criminal Court of the State of Puebla founded the jurisdiction of the courts of the State of Quintana Roo on the fact that the complaints by the victims of sexual exploitation that served as the basis of the book had been filed in that State.

[6] In the article, published in the newspaper *La Jornada*, Mr. Nacif said: "I told the Governor that this woman was libelling me, and he said no one is libelled here — and boom, they issued an arrest warrant for her." In the same article, the Governor of Puebla said: "If you ask me, this woman is a delinquent who committed an offence; if she says she is innocent, let her prove it in court instead of courting publicity in the media." The Attorney General of the State of Puebla acknowledged that the author was not notified of the arrest warrant so as to prevent her from "kicking up a fuss" and said that "reporters should hold on to their stories before they are made public, since their first duty is to inform the authorities". When asked about support for the author's case from various human rights organizations, such as Amnesty International and the World Organization against Torture, the

between the Governor of the State of Puebla and Mr. Nacif[7] were transcribed in the press and aired on radio and television, in which Nacif thanked the Governor for his efforts to arrest the author.[8] In subsequent public statements to the press, Mr. Nacif confirmed that he had asked the Governor of Puebla to intervene in the author's arrest and praised the Governor's "decisive action" and "firm hand", adding that he had wanted to "teach the author a lesson".

2.10 On 22 February 2006, the Congress of the Union requested the Supreme Court to exercise its power to investigate the facts relating to the author's detention and prosecution on the grounds that they might constitute "serious violations of individual guarantees".[9] On 29 November 2007, by a vote of 6 to 4, the Supreme Court concluded that the author's individual guarantees had not been seriously violated.

Criminal proceedings initiated by the author in respect of her detention and torture

2.11 On 13 March 2006, the author filed complaints with the Office of the Attorney General of the Republic concerning the offences of torture, attempted rape, arbitrary detention, intimidation and abuse of authority against two judicial officers of Puebla, and complaints concerning bribery, influence peddling, offences against the administration of justice and the offence of collusion among public servants against the Governor of Puebla, the Attorney General of the State of Puebla and the presiding judge of the Fifth Criminal Court of the State of Puebla, and all those who might be found responsible. The author's complaints led to the opening of two preliminary investigations by special prosecutors of the Office of the Attorney General of the Republic; the investigation was subsequently referred to the Office of the Special Prosecutor for Offences Committed against Journalists.

2.12 On 30 January 2008, the Office of the Special Prosecutor for Offences Committed against Journalists brought criminal proceedings before the Second Criminal Court of First Instance of the Judicial District of Cancún (State of Quintana Roo) in respect of the two State of Puebla judicial police officers alone, as probable perpetrators of the offence of torture. On 6 May 2008, the Second Criminal Court dismissed the criminal proceedings against the two defendants; the decision was confirmed on appeal by a decision of 8 January 2009 of the High Court of Justice of the State of Quintana Roo. Regarding the responsibility of the other persons against whom complaints were made, the Office of the Special Prosecutor decided on 16 June 2008 not to bring criminal proceedings.

2.13 In 2009, the Office of the Attorney General of the Republic launched new preliminary investigations against "those responsible" for the offences of abuse of public office and abuse of authority, in accordance with recommendation 16/2009 of the National Human Rights Commission.[10] However, these preliminary investigations were concluded without criminal charges being filed.

2.14 On 18 June 2009, the Office of the Attorney General of the State of Quintana Roo opened a preliminary investigation against a third judicial officer, of that State. The investigation was closed on 18 October 2011 on the ground that there was insufficient evidence to launch a criminal prosecution; the author was not informed of the decision.

Attorney General replied that what the author was doing was "pressuring the authorities, which is typical of people like her".

[7] In an open letter to the public, dated 6 April 2011, Mr. Nacif acknowledged the authenticity of the recordings.

[8] The conversation contained derogatory language and insults used by the Governor to refer to the author, including the following: "Well, I sure gave that old bitch her [expletive] comeuppance yesterday. I told her that in Puebla the law is respected and anyone who commits a crime is called a criminal."

[9] A power provided for under article 97 (2) of the Constitution of the United Mexican States (the provision has been repealed).

[10] The National Human Rights Commission — the national human rights institution of Mexico — received a complaint in December 2005 regarding the author's arbitrary detention, incommunicado detention, torture and cruel and inhuman treatment. In recommendation 16/2009, of 6 March 2009, the Commission concluded that the author had been subjected to acts of torture, but it held only two Puebla State judicial police officers responsible.

2.15 On 2 December 2014, the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression launched a new preliminary investigation and brought criminal proceedings against the two Puebla State judicial police officers. On 9 December 2014, the Second District Court of the State of Quintana Roo issued an arrest warrant for the two officers. On 11 December 2014, one of the officers was arrested; the second is currently a fugitive from justice. On 17 December 2014, a detention order was issued against the arrested officer, who was remanded in custody.

Criminal proceedings initiated by the author in relation to threats received after her release

2.16 Following the author's release, she was provided with protection by the federal authorities, including escorts when travelling. Nevertheless, on 7 May 2007, the author was the victim of an attack when the tyres of the vehicle that was to take her from the airport to her home were punctured, causing the driver of the vehicle to lose control shortly after setting off. In addition, between February and May 2009 and July 2012, the author received several death threats by email and telephone and on her blog. The author filed several complaints of threats and intimidation with the Office of the Attorney General of the Republic, which resulted in the opening of four preliminary investigations. However, the investigations did not lead to criminal proceedings being brought.

Request for precautionary measures to the Inter-American Commission on Human Rights[11]

2.17 On 19 June 2009, the author submitted a request for precautionary measures to the Inter-American Commission on Human Rights. On 10 August 2009, the Inter-American Commission granted precautionary measures to safeguard the life and physical integrity of the author, her family and colleagues at the Centro Integral de Atención a la Mujer.

The complaint

3.1 The author claims that she is the victim of a violation of her right to freedom of expression under article 19 of the Covenant, since she was arrested and charged with defamation and calumny for publishing her book. The author submits that, although the Committee has recommended that the State party repeal the offences of defamation and calumny throughout the country,[12] they remain offences in 16 of the 33 criminal codes in existence in the State party. These offences are broadly and ambiguously defined and unduly restrict freedom of expression, since they do not meet the requirements of legality, necessity and proportionality and are intended to have a censorship effect. The custodial penalty provided for these offences is disproportionate to any harm that may be caused.

3.2 The author submits that in the State party each federative entity has considerable latitude in determining what conduct is criminalized and that this amounts to unequal treatment of persons subject to the jurisdiction of the State party based on their state of residence. Thus, while people are able to exercise their right to freedom of expression in some states, they may be criminally prosecuted for defamation, calumny and vilification in other states. In the author's case, the judicial authorities of the State of Puebla charged her with the offences of defamation and calumny, while the judicial authorities of Mexico City dismissed charges for the same acts on the grounds that the offences did not exist in that jurisdiction.

3.3 The author further claims that she is a victim of a violation of article 15 (1) of the Covenant, since the offences of defamation and calumny continue to exist in 16 states of Mexico, without being clearly defined in the criminal codes of those states. The author maintains that such a situation impedes legal predictability and allows for the extraterritorial application of those offences in other jurisdictions where they do not exist.

[11] Although the Inter-American Commission on Human Rights adopted precautionary measures in respect of the author's case, it was not registered as an individual case, which is an option available under article 25 of the Commission's rules of procedure.

[12] See CCPR/C/MEX/CO/5, para. 20.

3.4 The author submits that her detention was unlawful and arbitrary, in violation of article 9 of the Covenant, since it was based on a restriction of the freedom of expression, contrary to the Covenant. She adds that her detention resulted from an abuse of public office, since the Governor of the State of Puebla ordered her to be criminally investigated and detained using his powers as a senior public official, as was clear from the recordings of the conversations between the Governor and Mr. Nacif that had been made public. The arrest was made by the authorities of the States of Puebla and Quintana Roo, who had no material or territorial jurisdiction to prosecute the alleged acts. Furthermore, the officers who arrested her had not been authorized to do so, since the prosecutor's office of the State of Puebla requested the cooperation of its counterpart in the State of Quintana Roo and sent it the names of the two arresting officers from the Puebla judicial police six hours after the arrest had been carried out. Lastly, the author states that she was admitted to the Social Rehabilitation Centre in Puebla even though no documents authorizing her admission had been submitted.

3.5 The author adds that the detention order contained no assessment of the constitutionality and proportionality of the custodial measure imposed on her. Furthermore, no evaluation was made of whether there was sufficient evidence to support a claim for the moral damages or discredit caused to the complainant by the publication of the author's book. The detention order therefore amounted to disproportionate censorship of the author's investigative journalism.

3.6 The author claims that the conditions of her transfer from the State of Quintana Roo to Puebla and the treatment to which she was subjected during that transfer constitute a violation of article 7 of the Covenant. As a result of these events, the author was diagnosed with post-traumatic stress disorder.[13] In addition, the conditions of her detention constituted a violation of article 10 of the Covenant.

3.7 The author further claims that she was a victim of gender violence — because she is a woman — during her detention and transfer to the State of Puebla. The fact that she was accompanied by male officers alone put her at risk of sexual assault. Moreover, the officers accompanying her made sexual comments to the effect that if she wanted to eat she had to "behave and perform oral sex on them" or that "she was their little toy and they were going to have a lot of fun".

3.8 The author submits that the criminal proceedings against her were fraught with violations of the right to due process, as recognized in article 14 (1) of the Covenant, including: (a) the failure to give notice of the opening of a preliminary investigation against her by the prosecution service; (b) the lack of territorial jurisdiction of the criminal court of the State of Puebla; (c) the failure to notify the author of the reasons for her detention; (d) the refusal to allow her to communicate with her lawyer during her detention and transfer to the State of Puebla; (e) the involvement of private individuals close to Mr. Nacif in her arrest; and (f) the imposition of a bail amount disproportionate to the nature of the offences (140,000 Mexican pesos (US$ 7,400), an amount which was later halved).

3.9 The author also submits that the courts that heard the criminal case against her lacked independence and impartiality. The commission of inquiry established by the Supreme Court of Mexico found that there was evidence of a "relationship between Nacif and the judiciary of the State of Puebla".[14] The author claims that there was an agreement between private individuals and executive and judicial authorities of the State of Puebla, including the Governor and the president of the High Court of Justice of that State, to persecute the author and punish her for her journalistic work and to produce a chilling effect on other journalists.

3.10 The author submits that domestic remedies have not been effective in ensuring, within a reasonable time, the investigation and punishment of those responsible for her arbitrary detention and torture and the threats made against her. Eight years after her

[13] The author provides a copy of a medical/psychological expert evaluation dated 29 September 2006 from the Office of the Special Prosecutor for Offences Related to Acts of Violence against Women.

[14] The author provides a copy of the transcript of the ordinary public session of the Supreme Court, sitting in plenary, held on Monday, 26 November 2007.

detention, and notwithstanding the extensive evidence adduced, no significant progress has been made in the investigations against those responsible for acts of torture. Those investigations have been unjustifiably prolonged and ineffective, in violation of article 2 (3) of the Covenant.

3.11 Lastly, the author claims a violation of her right to liberty of movement within Mexico, as recognized in article 12 of the Covenant.

3.12 The author requests the Committee to call on the State party: (a) to conduct a thorough investigation of the author's arbitrary detention, torture and ill-treatment and of the lack of due process guarantees and to take appropriate measures against those responsible for such acts; and (b) to provide the author with full and appropriate compensation for the harm suffered.

State party's observations on admissibility

4.1 In its observations of 6 July 2016, the State party maintains that the communication is inadmissible because the author has failed to exhaust domestic remedies. First, the State party points out that an application for *amparo* was the effective and appropriate remedy for addressing the claims brought by the author to the Committee, since *amparo* is the usual remedy for protecting human rights. Specifically, the author should have lodged an *amparo* appeal to challenge the constitutionality of the offences of calumny and defamation, which at the time were defined under the criminal legislation of the State of Puebla.

4.2 Second, a number of criminal investigations are under way into the facts described by the author. They include several investigations initiated since 2006 by the Attorney General's Office into the complaints brought by the author. As part of these investigations, a suspect was arrested and a detention order was issued against him for the offence of torture on 17 December 2014. The criminal proceedings are currently at the pretrial stage. The arrest warrant for the second judicial officer charged has yet to be executed. Regarding the investigations into collusion between individuals and high-level Mexican authorities, the State party points out that preliminary investigations by the Attorney General's Office have been under way since 2007, but that it has not been possible to bring criminal proceedings on the basis of the evidence currently available. With regard to the author's complaints of threats, the State party reports that, on 18 May 2007, the prosecution service opened a preliminary investigation into an alleged criminal attack against the author. However, on 8 July 2013, the prosecution service decided against bringing criminal proceedings. On 4 March 2010 and 5 October 2012, the prosecution service opened preliminary investigations into the author's complaints of threats; the investigations are ongoing.

4.3 The State party further submits that the communication is incompatible with the provisions of the Covenant. It points out that it is for the Mexican authorities to investigate the alleged facts and to evaluate the facts and evidence, unless it can be shown that there has been arbitrariness or a denial of justice, which is not the situation in the present case. The State party submits that, in addition to the criminal investigation conducted by the Office of the Attorney General of the Republic, the Supreme Court of Mexico investigated the allegations and that, in the course of that investigation, the author had the opportunity to testify and submit evidence. However, following the completion of the investigation on 29 November 2007, the Court found that it had not been established that the author's individual guarantees had been seriously violated in the course of the criminal proceedings against her, a matter which the Committee is barred from re-evaluating.

Author's comments on the State party's observations on admissibility

5.1 In her comments of 7 October 2016, the author submits that there has been an unjustified delay in access to justice, since no progress has been made in the investigation of the complaints filed with the Office of the Attorney General of the Republic in March 2006. Criminal proceedings for the offence of torture were not brought against two judicial officials until December 2014, that is, nine years after the initial complaints were lodged and after the communication was submitted to the Committee in October 2014. Regarding the other investigations, they remain open after 10 years, a delay that cannot be justified by

the complexity of the case. The author adds that, given the inaction of the prosecution service, she alone has repeatedly sought to move forward the only proceedings open against one of the judicial officials.

5.2 With regard to the failure to exhaust the remedy of *amparo* in respect of the constitutionality of the criminal provisions of the State of Puebla defining the offences of defamation and calumny, the author submits that this extraordinary remedy would have been ineffective in her case, since an application for *amparo* would have led to a suspension of the main proceedings against her while the question of the constitutionality of those legal provisions was decided,[15] thereby prolonging the main proceedings and increasing the risk of further attacks against the author during her pretrial detention. The remedy that at that time afforded the author the best protection was an appeal against the detention order. Furthermore, the author filed several applications for a declaration of lack of jurisdiction. The author thus submits that she has exhausted the ordinary, appropriate and available remedies.

5.3 The author further submits that an *amparo* application against the arrest warrant would not have been appropriate, since the warrant had already been executed and the Constitution provides that an application for *amparo* cannot be filed in respect of "violations that have already been committed".[16] She adds, in this connection, that she could not lodge an application for *amparo* before her detention, since she was never notified of the existence of a preliminary investigation against her. The author points out that there is no specific procedure for restoring a person's liberty or for repairing the harm caused by unlawful or arbitrary detention.

5.4 The author points out that, during his mission to Mexico in 2014, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment described as "generalized" the use of sexual violence as a form of torture, mainly against women detainees, and the prevailing impunity in such cases.[17]

5.5 The author submits that the investigations conducted by the Supreme Court of Mexico and the National Human Rights Commission are not binding judicial procedures. Furthermore, as no criminal proceedings have been concluded, there is no res judicata.

State party's observations on the merits

6.1 In its observations of 24 March 2017, the State party reiterates its arguments on the inadmissibility of the communication. It insists that the author should have lodged a direct *amparo* application against the provisions establishing the offences of defamation and calumny and an indirect *amparo* application against "the official act that resulted in the arrest warrant for the author".

6.2 The State party submits that the power of investigation vested in the Supreme Court of Mexico at the time of the events constituted a judicial remedy for constitutional review.

6.3 The State party maintains that the communication has become moot, since it has addressed the specific situation raised therein by repealing, on 23 February 2011, the articles of the Social Protection Code for the Free and Sovereign State of Puebla criminalizing defamation and calumny. The offences were also removed from the Criminal Code of the State of Quintana Roo. According to the State party, the fact that the two offences remain in the criminal codes of other states does not constitute a violation of the Covenant as far as the present communication is concerned. The State party adds that steps have also been taken to remedy the general situation raised by the present communication. In this connection, on 5 July 2010, the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression was established with the task of coordinating the investigation and prosecution of offences against journalists. Furthermore, in June 2012, the Mechanism for the Protection of Human Rights Defenders and Journalists, which includes civil society representatives, was established with a mandate to protect journalists in the exercise of their profession.

[15] Article 73 (X) of the Amparo Act (repealed).
[16] Ibid.
[17] See A/HRC/28/68/Add.3, paras. 28 and 35.

6.4 The State party submits that, in order to determine a violation of the author's right to freedom of expression, it must be shown that the authorities colluded to use the judiciary against her, which has not been proven in the present case. The State party adds that the burden of proof rests with the author to demonstrate such collusion, but that she has presented only one piece of evidence, which was acquired unlawfully, namely the recordings of the conversations between the Governor of the State of Puebla and Mr. Nacif. In any event, such evidence is inadmissible, since it has no probative value because the persons involved have not acknowledged the veracity of the conversations and no further evidence has been produced to establish their authenticity. Furthermore, the provenance of the recordings and the manner of their acquisition are not known.

6.5 The State party maintains that the author's detention was justified by the existence of a complaint concerning offences under the criminal legislation of the State of Puebla at the time of the events. Accordingly, the prosecution service opened a preliminary investigation against the author, and her arrest was ordered. The State party adds that the arresting police officers were properly identified and that they informed the author of the charges against her. Furthermore, she was allowed to make a telephone call.

6.6 The State party submits that the author's arrest and detention were lawful, necessary and proportionate. One day after her arrest, the author was presented before a judge, who ordered her release on bail. Her detention was therefore judicially reviewed. The State party submits that the author's allegations regarding how she was treated during her transfer are a separate matter and the subject of criminal investigations.

6.7 The State party maintains that the author's detention alone does not constitute a violation of her right to freedom of expression and that it has not been proven that her detention was intended to undermine the freedom of expression.

6.8 As regards the author's allegations concerning the failure to notify her of the investigations against her, the State party points out that neither the Constitution nor the criminal law of Mexico requires the prosecution service to notify individuals that they are the subject of an investigation for an offence.

6.9 As to the effectiveness of the ongoing criminal investigations and, in particular, the time elapsed before the opening of the investigations and the arrest of a suspect, the State party points out that the obligation to investigate is an obligation of means and not an obligation of result; consequently, passage of time alone is not a measure against which the manner in which the national authorities conduct an investigation can be assessed. The State party adds that the author's initial submission was not transmitted until May 2016 and would therefore have had no impact on the investigations and arrest referred to therein. In any event, the author had available to her the remedy of *amparo* to put forward her claims of undue delays.

6.10 Lastly, the State party points out that the criminal investigations into the facts alleged by the author were thorough and impartial, since they were conducted by an independent body that was not involved in the alleged acts, namely, the Office of the Attorney General of the Republic.

Author's comments on the State party's observations on the merits

7.1 In her comments of 4 June 2017, the author maintains that the investigations that have been ongoing since March 2006 have been delayed without justification and that it was only after the submission of the present communication to the Committee on 13 October 2014, which was announced in a public interview with the author on that date, that proceedings were brought against the two officers charged, although no new evidence had been adduced or investigations conducted since 2007.[18]

[18] The author cites *Ramírez et al. v. Mexico* (CAT/C/55/D/500/2012), in which the Committee against Torture pointed out the existence of an unjustified delay in investigations six years after the commission of acts of torture; those investigations were relaunched only after the communication had been submitted to the Committee.

7.2 The author claims that, when regulating the right to freedom of expression and the limitations imposed on the right to privacy and honour of persons, the State should not resort to such onerous measures as the application of criminal law, let alone custodial sentences. The author points out that, at the time of the events, the State of Puebla criminalized defamation and calumny and that it was on that legal basis that the detention order was issued against her, which violated her rights to personal freedom and freedom of expression.

7.3 Regarding the general measures taken by the State party, the author submits that the establishment of the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression has had no impact on efforts to reduce the widespread impunity for offences against journalists, as indicated by the Office in its 2016 report, according to which the level of impunity for these offences is 99.75 per cent.[19] For its part, the Mechanism for the Protection of Human Rights Defenders and Journalists has been severely criticized by Mexican civil society and international organizations because of the ineffectiveness of the protection measures granted by it.[20]

7.4 The author stresses that, although she was released shortly after her arrest, it was only on payment of bail of US$ 3,700.

7.5 The author maintains that the rulings of the commission of inquiry established by the Supreme Court of Justice of Mexico are not binding and they had been arrived at on political grounds rather than on the basis of criminal law. The commission had ruled that the telephone-tapping evidence could not be taken into account without also taking into account other evidence, including the public statements made by Mr. Nacif himself (see para. 2.9).

Additional information from the State party

8. In a note dated 18 June 2018, the State party indicated that, on 17 October 2017, the Second District Criminal Court of the State of Quintana Roo had convicted one of the two judicial officers on charges of torture and imposed a sentence of imprisonment for 5 years and 3 months, together with a fine, dismissal from his post and ineligibility for public functions for the duration indicated in the sentence. That decision was upheld at appeal by the District Court of the Sixth Region of Chihuahua on 13 March 2018.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

9.2 The Committee takes note of the State party's argument that the author failed to exhaust domestic remedies owing to the fact that she did not file an application for *amparo* to challenge the constitutionality of the criminal provisions of the State of Puebla establishing the offences of defamation and calumny and that there are several ongoing criminal investigations into the violations alleged by the author to have taken place during her detention and following her release.

9.3 However, the Committee notes the statements by the author — which the State party has not refuted — that the filing of an *amparo* application in respect of the constitutionality of the provisions establishing the offences of defamation and calumny would have been ineffective, since it would have resulted in the suspension of the criminal proceedings against her, in accordance with the Amparo Act in force at that time, thereby unnecessarily prolonging the proceedings and the risk of her suffering further attacks during her pretrial detention. The author has also submitted that it was not possible for her to file for *amparo*

[19] Statistical Report of the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression, August 2016.

[20] The author cites, among other sources, the 2016 report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission for Human Rights.

relief against her detention before the detention took place, as required under domestic legislation, since she had not been notified of any investigation against her.

9.4 Regarding the ongoing criminal investigations into the author's complaints of, among other things, torture, abuse of authority and collusion, the Committee notes that the criminal investigations into torture reopened against two officers following the submission of the present communication resulted in the conviction of a single officer 12 years after the events occurred, a decision that was upheld at appeal; that another arrest warrant is still valid; that the investigations for abuse of authority and collusion were closed without any criminal proceedings being initiated; and that the investigations into the threats and intimidation to which the author had been subjected following her release have made no progress since 2007, have not led to any criminal proceedings being filed and have therefore been excessively lengthy. In these circumstances, and in the absence of any information in the file to suggest that there are any other pending criminal proceedings in relation to the author's complaints, the Committee considers that the domestic remedies available have been exhausted. In the light of the foregoing, the Committee finds that article 5 (2) (b) of the Optional Protocol is not an obstacle to the admissibility of the present communication.

9.5 The Committee notes that the author has not provided any information to justify the alleged violation of article 12 of the Covenant and therefore declares that this part of the communication is insufficiently substantiated, for purposes of admissibility, and finds it inadmissible under article 2 of the Optional Protocol.

9.6 The Committee takes note of the author's claims under article 15 (1) of the Covenant, in the sense that while the offences of defamation and calumny are no longer criminal offences in a number of Mexican states, they are still offences in various other Mexican states and may have extraterritorial application, as in the case of the author, and such a situation impedes legal certainty. The Committee is of the view, however, that the coexistence of different criminal statutes in a federal State does not in itself violate the Covenant. In the absence of any information in the file to show that the acts attributed to the author did not constitute at the time of their commission offences under the law in force at the time, and without making any determination as to what law should be applied in the author's case, the Committee considers that the complaint based on article 15 (1) has not been sufficiently substantiated for the purposes of admissibility and therefore declares this part of the communication inadmissible under article 2 of the Optional Protocol.

9.7 The Committee also notes the author's claims under article 14 (1) of the Covenant relating to the lack of independence and impartiality of the national courts that considered the criminal case against her. However, in the absence of further information or evidence in support of this claim, the Committee considers that the latter has not been sufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

9.8 However, the Committee finds that the author's claims under articles 2 (3), 3, 7, 9, 10 and 19 of the Covenant relating to the treatment received during her arrest and detention, the lack of effective remedies to challenge such treatment and the restriction of her right to freedom of expression have been sufficiently substantiated for purposes of admissibility, declares them admissible and proceeds with their examination on the merits.

Consideration of the merits

10.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

10.2 The Committee takes note of the author's allegations, which the State party has not challenged, concerning the treatment to which she was subjected during her transfer to the State of Puebla, including the repeated sexual assaults described by her, the death threats, the refusal to let her use the bathroom, sleep, eat or take the medication needed to treat her medical condition, and the sexual assaults against her during her detention on the premises of the Office of the Attorney General of the State of Puebla. The Committee considers that the treatment described constitutes a violation of article 7 of the Covenant.

10.3 The Committee further notes that the treatment to which the author was subjected had a discriminatory purpose based on her sex, in the light of the nature of the sexual comments made and of the sexualized treatment and gender-based violence inflicted on her. The Committee also takes note of the pattern of sexual violence against women detained in the State party and the prevailing impunity for such violations.[21] Consequently, the Committee considers that the treatment to which the author was subjected also constitutes a violation of article 3, read in conjunction with article 7 of the Covenant.

10.4 Having concluded that there has been a violation of articles 7 and 3, read in conjunction with article 7, the Committee does not consider it necessary to examine the author's complaint under article 10 of the Covenant separately in respect of the same facts.

10.5 The Committee takes note of the author's allegations that her detention on charges of defamation and calumny for her publication was a violation of her right to freedom of expression under article 19 of the Covenant. The Committee recalls that "freedom of opinion and freedom of expression are ... essential for any society. They constitute the foundation stone for every free and democratic society."[22] The Committee further recalls that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself" and that "the relation between right and restriction, and between norm and exception must not be reversed".[23] Furthermore, the restrictions must "be provided by law ... and conform to the strict tests of necessity and proportionality".[24]

10.6 In the present case, the Committee takes note of the authors' allegations, which the State party has not challenged, that, as a result of publishing a book in which she identified senior business leaders and officials involved in the sexual exploitation of children, one of the business leaders mentioned filed a complaint against the author in the State of Puebla for the offences of defamation and calumny, on the basis of the legislation in force in the State at that time, and that the complaint led to the author's arrest on 16 December 2005 by a group of at least 10 armed men, including private agents of the businessman in question. The Committee also takes note of the author's allegations that, at the time of her arrest, no arrest warrant was shown and that she was not allowed to contact her lawyer during her transfer, which lasted 20 hours. The State party submits that the author's detention was in accordance with the legislation in force at that time in the State of Puebla but has provided no further information to justify that the detention was necessary and proportionate.

10.7 The Committee recalls that "States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. ... All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims ... be in receipt of appropriate forms of redress."[25]

10.8 The Committee further recalls that "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty".[26] If defamation should never result in a penalty of deprivation of liberty being imposed on the grounds that it is not an appropriate penalty, then a fortiori no detention based on charges of defamation may ever be considered either necessary or proportionate.

10.9 In the context described (see para. 10.6), and even assuming that the author's detention was based on the state legislation in force in the State of Puebla and that the

[21] In this regard, see the Committee's Views in *Purna Maya v. Nepal* (CCPR/C/119/D/2245/2013), para. 12.4.
[22] General comment No. 34 on freedoms of opinion and expression, para. 2.
[23] Ibid., para. 21.
[24] Ibid., para. 22.
[25] Ibid., para. 23.
[26] Ibid., para. 47.

legislation pursued a legitimate aim, such as protecting personal honour, the Committee considers that detention was not a necessary or proportionate measure to achieve that aim,[27] in violation of her right to freedom of expression under article 19 of the Covenant.

10.10 With regard to the author's allegations under article 9 of the Covenant which relate to the arbitrary nature of her arrest and detention, the Committee recalls its jurisprudence indicating that the concept of "arbitrariness" must not be equated with that of "against the law", but it should be interpreted more broadly such as to include considerations relating to inappropriateness, injustice, unpredictability and due process guarantees as well as those relating to reasonableness, necessity and proportionality.[28] The Committee further recalls that detention or imprisonment is arbitrary when it is used as a penalty for the legitimate exercise of rights guaranteed under the Covenant, such as freedom of opinion and expression.[29]

10.11 The Committee considers that, in the circumstances described and in the light of the public statements made by the businessman in question and by other high-level executive and judicial authorities of the State of Puebla, statements that have not been refuted by the State party, and for the reasons set out in paragraph 10.8, the author's detention was neither necessary nor proportionate but was punitive and consequently arbitrary, in violation of article 9 of the Covenant.[30]

10.12 Lastly, the Committee takes note of the author's allegations that she did not have access to an effective remedy for investigating and punishing those responsible for the violations of her rights within a reasonable time, in violation of article 2 (3) of the Covenant. The Committee notes in this respect that the author filed complaints for acts of torture, attempted rape, arbitrary detention and abuse of authority, among other offences, in March 2006, but that, 12 years later, no progress had been made in investigating several of those complaints. The Committee notes, in particular, that the prosecution service brought criminal proceedings against two judicial officials only in January 2008, that is, nearly two years later, and that the criminal courts nevertheless declined to open a criminal case. It was only in December 2014, after six years of inaction and shortly after the submission of the present communication to the Committee, that a new investigation was opened against the two officials and criminal proceedings were brought. This resulted in the conviction of one of the two officials in October 2017, nearly 12 years after the submission of the author's complaint, while the other official has evaded justice since December 2014. Regarding the other persons against whom complaints were brought, namely the businessman and the senior executive and judicial authorities of the State of Puebla, the prosecution service decided in June 2008 not to bring criminal proceedings. In the light of the foregoing, and in the absence of information from the State party justifying such significant delays, the Committee concludes that the author did not have access to an effective remedy to address the violations of her rights, in violation of article 2 (3), in conjunction with articles 3, 7, 9 and 19 of the Covenant.

10.13 The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 3, in conjunction with article 7; 9; 19; and 2 (3), in conjunction with articles 3, 7, 9 and 19 of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose rights have been violated. In this connection, the State party should: (a) conduct an impartial, prompt and thorough investigation into the author's allegations; (b) prosecute, try and punish appropriately the persons found guilty of the violations; and (c) provide the author with appropriate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the

[27] In this connection, see the Committee's Views in *Rafael Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.8, and *Khadzhiyev v. Turkmenistan* (CCPR/C/121/D/2252/2013), para. 7.7. See also CCPR/C/MEX/CO/5, para. 6.8.

[28] General comment No. 35 on liberty and security of person, para. 12.

[29] Ibid., paras. 17 and 53.

[30] In this same regard, see the Committee's Views in *Rafael Marques de Morais v. Angola*, para. 6.1.

future and ensure that all journalists and human rights defenders are able to exercise their right to freedom of expression in their activities, including by decriminalizing the offences of defamation and calumny in all the federated states.[31]

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views and to have them widely disseminated.

[31] See CCPR/C/MEX/CO/5, para. 20.

United Nations CCPR/C/123/D/2768/2016

International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2768/2016*, **

Communication submitted by:	Z.B. (represented by counsel, Gruša Matevžič of the Hungarian Helsinki Committee)
Alleged victims:	The author
State party:	Hungary
Date of communication:	23 May 2016 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure transmitted to the State party on 25 May 2016 (not issued in document form)
Date of adoption of decision:	19 July 2018
Subject matter:	Deportation to Serbia
Procedural issue:	Victim status
Substantive issues:	Risk of torture, cruel, inhuman or degrading treatment or punishment; non-refoulement; right to an effective remedy
Articles of the Covenant:	2 (3) (a), 7 and 13
Article of the Optional Protocol:	2

1.1 The author of the communication is Z.B., born on 2 February 1982. She is a Cameroonian and South Sudanese national seeking asylum in Hungary and subject to deportation to Serbia following the rejection of her application for refugee status in Hungary by the Hungarian authorities. She claims that by forcibly deporting her to Serbia, Hungary would violate her rights under article 7, read alone and in conjunction with article 2 (3) (a), and article 13 of the Covenant. The author is represented by the Hungarian Helsinki Committee. The Optional Protocol entered into force for Hungary on 7 September 1988.

1.2 On 25 May 2016, pursuant to rule 92 of the Committee's rules of procedure, the Special Rapporteur on new communications and interim measures requested the State party

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the present communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

to refrain from deporting the author to Serbia while her case was under consideration by the Committee.

The facts as submitted by the author

2.1 The author was born in Cameroon. She resided in Douala, Cameroon, with her son and her sister. On 8 February 2015, while the author and her son were away, unidentified persons broke into her apartment and severely beat her sister.[1] The attack was motivated by her sister's homosexuality. Homosexuality is illegal in Cameroon. Following the attack, the Cameroonian authorities issued an arrest warrant for the author and her sister, accusing the author of facilitating homosexuality.[2] The author therefore fled with her son and her sister to northern Cameroon.

2.2 Soon afterwards, the arrest warrant was extended to the whole territory of the country. The author therefore fled in June 2015, to Yambio, South Sudan, together with her son and sister, to live with her father and half-brother. South Sudan was in a state of civil war at that time. One night in November 2015, a group of around 30 armed men broke into the author's father's house and forced the author and her father, and her half-brother and her sister respectively, to engage in sexual acts. They then killed all the men and boys present, including the author's 10-year-old son. Following the attack, Mr. B., a friend of the author's father, offered to help the author and her sister to flee to Europe.

2.3 At an unknown date, the author and her sister flew to Istanbul, Turkey, accompanied by Mr. B. At the airport, Mr. B took their possessions and left, promising to return. Instead, two strangers took them to a van with around 10 other people. Two weeks later, the author and her sister were blindfolded and forced into a van with many other occupants.[3] They travelled during the night and were not told of their destination, but the next morning they arrived in Belgrade. The traffickers kept the author and her sister captive in a house for at least one month, until February 2016. During that time, the traffickers raped them and forced them into prostitution.

2.4 During a night of February 2016, the traffickers abandoned the author, her sister and several other captives in a forest close to the Hungarian border, informing them that they were already in Hungary, although in fact they were still in Serbia. On 23 February 2016, after walking in the direction indicated by the traffickers, the author and her sister entered Hungary through holes in the border fence. They were caught by the police and brought to the Border Control field office in Szeged, where they submitted an asylum application. On 24 February 2016, they were placed in the Bicske refugee reception centre.

2.5 On 11 April 2016, the Office of Immigration and Nationality conducted the author's first and only interview. A French-speaking interpreter was present. However, at the end of the interview, the interviewer did not read the minutes back to the author and she was not therefore able to correct the errors.[4] On 13 April 2016, legal advisers from the Hungarian Helsinki Committee met with the author and provided her with the translated minutes of her interview. The author and the legal advisers noted the errors and drafted a document that the author submitted to the Office of Immigration and Nationality.

2.6 On 15 April 2016, the Office of Immigration and Nationality declared the author's application inadmissible under section 51 (2) (e) of Act LXXX of 2007 on Asylum (Asylum Act), on the grounds that she had arrived through Serbia, which was considered a safe third country. The author alleges that the Office of Immigration and Nationality did not give any consideration to the document prepared by the Helsinki Committee.[5] The decision

[1] As a consequence of the attack, the author's sister had to undergo surgery to have her ovaries removed.

[2] The Committee has no information as to the date of the arrest warrant.

[3] The Committee has no information as to what happened during those two weeks.

[4] The author alleges that, for example, the minutes incorrectly recorded that she was lesbian, like her sister, and that this was her reason for leaving Cameroon.

[5] The author provides the original decision in Hungarian and an unofficial translation. The decision makes no reference to the Helsinki Committee document, but repeats some of the errors from the asylum interview that were clarified in the Helsinki Committee document.

cited information about Serbia and referred to the constitutional protection of the right to asylum in Serbia and its ratification of a number of international human rights treaties guaranteeing that right, as well as the fact that Serbia had an asylum law which came into force in 2008 and a legal framework for making decisions and revising them. However, in its decision the Office of Immigration and Nationality did not take into consideration whether access to asylum in Serbia was guaranteed in practice and made no mention of the sexual abuse the author had suffered in Serbia. Nor did they evaluate the information she had provided on the atrocities committed against her and her sister in Belgrade, or take into account the fact that they were victims of human trafficking. On that basis, the Office of Immigration and Nationality mistakenly concluded that the author had had the opportunity to apply for asylum in Serbia, ordered her expulsion and issued a two-year entry ban.

2.7 The decision of the Office of Immigration and Nationality was communicated to the author on 20 April 2016. She submitted an appeal to the Administrative and Labour Court of Budapest and requested a personal hearing.[6] On 26 April 2016, the author's counsel sent an urgent submission to the court via the Office of Immigration and Nationality.[7] The counsel argued that Serbia could not be considered a safe third country for the author; that the individual assessment concerning refoulement to Serbia had not been carried out with due care; that the author's statements on her captivity and rape in Serbia had not triggered a special investigation, given that she was particularly vulnerable; that no medical expert had been ordered to examine her; and that the Office of Immigration and Nationality had not presented any evidence that Serbia was a safe country for the author or given her an opportunity to comment in that regard.

2.8 The Office of Immigration and Nationality claimed to have received the submission on 29 April 2016 and, despite the urgency, it forwarded it to the court only on 2 May 2016. The author's counsel called the court on 2 and 3 May 2016 to inquire whether the submission had been received, but was informed that the submission had not arrived and that the case had not yet been registered. On 4 May 2016, counsel called again and was informed that a case number had been assigned to the case on 3 May in the afternoon and that the court had already decided the case. The decision is dated 3 May 2016, demonstrating that the court did not duly examine her submission. The judge did not mention that the author was represented in the proceedings.

2.9 In its decision of 3 May 2016, the Budapest Administrative and Labour Court rejected the author's appeal and confirmed the decision of the Office of Immigration and Nationality, stating that the author had not presented any new facts concerning the legal questions arising from her case. The court did not therefore find it necessary to hear her in person. The court also stated that the author had not presented facts explaining why Serbia would not be a safe country for her[8] and noted that the author had had the chance to apply for asylum in Serbia and invoke effective protection, but had not done so. The court concluded that the information on Serbia indicated that asylum could be granted there. It further stated that "according to section 2 of government decree 191/2015 (VII.21) on safe countries of origin and safe third countries, Serbia, as an acknowledged candidate state to join the European Union, is a safe third country. The decree establishes a presumption (*praesumptio iuris*) concerning the safety of Serbia. The Office of Immigration and Nationality communicated this fact to the applicant in the asylum procedure, yet she presented no facts explaining why Serbia would not be a safe country for her."

2.10 The author submits that, according to section 53 (5) of the Asylum Act, decisions by the Budapest Administrative and Labour Court in judicial review procedures on asylum issues cannot be appealed, and she has thus exhausted all domestic remedies.

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[6] According to section 53 (3) and (4) of the Asylum Act, an asylum seeker has seven days to appeal and the court has to decide the case in eight days. A personal hearing is not mandatory.

[7] According to section 53 (3) of the Asylum Act, the request for review must be submitted to the refugee authority within seven days of the communication of the decision. The refugee authority must then forward the request for review, together with the documents of the case and its counter-application, to the court without delay.

[8] The author claims that she did mention in the interview with the Office of Immigration and Nationality that she was held in captivity in Serbia, forced into prostitution and raped several times.

The complaint

3.1 The author claims that her deportation to Serbia would expose her to a violation of article 7 of the Covenant. Referring to the Committee's general comments No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the author submits that a State party may violate the Covenant when it is foreseeable that its decision on a person within its jurisdiction may be violating that person's rights in another jurisdiction.[9] The Committee has also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the applicant's country of removal.[10] There are substantial grounds for believing that the removal of the author to Serbia would create a real risk of irreparable harm amounting to inhuman or degrading treatment.

3.2 The author refers to the jurisprudence of the European Court of Human Rights in *Budina v. Russia*, according to which the inaction of a State party in the face of severe conditions within their jurisdiction may amount to inhuman or degrading treatment.[11] She also refers to the case of *M.S.S. v. Belgium and Greece*, in which the Court held that inappropriate reception conditions and serious shortcomings in asylum procedures amounted to inhuman and degrading treatment.[12]

3.3 The author then points to the multiple deficiencies of the Serbian asylum system that have been consistently recorded over the past years in publicly available reports of national and international organizations, including the non-registration of asylum applications, routine pushbacks, delays, lack of procedural safeguards during the asylum procedure and failure to identify vulnerable applicants.[13]

3.4 Persons returned to Serbia are in practice barred from accessing the asylum procedure and reception facilities. They are rather prosecuted for irregular border crossing, which is a criminal offence punishable by a fine or imprisonment. In practice, most persons are only issued with a warning; however, the court decision is accompanied by a decision of the Ministry of the Interior which terminates the asylum seekers' right to stay on Serbian territory. Following that decision, asylum seekers are not allowed to stay in one of the refugee camps in the country and, for want of a registered residence, cannot formally lodge an asylum application in Serbia.[14]

3.5 In addition, there is a lack of capacity leading to a reception crisis owing to the sharp increase of migrant arrivals in Serbia. The number of migrants entering Serbia, along with issues of mismanagement at asylum reception centres, which may deny people with certificates of entry,[15] has led to many asylum seekers being forced to sleep rough in

[9] See *Kindler v. Canada*, (CCPR/C/48/D/470/1991).

[10] See *X. v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

[11] European Court of Human Rights, *Budina v. Russia* (dec.), Case No. 45603/05, decision of inadmissibility adopted on 18 June 2009.

[12] European Court of Human Rights, *M.S.S. v. Belgium and Greece* Case No. 30696/09, Judgment, 21 January 2011.

[13] The author refers to Hungarian Helsinki Committee, "Serbia as a safe third country: revisited" (June 2012); Commissioner for Human Rights of the Council of Europe, "Serbia should end degrading reception conditions for asylum seekers", 12 December 2013; Belgrade Centre for Human Rights, "Right to asylum in the Republic of Serbia, 2014" (March 2015); Amnesty International, "Europe's borderlands: violations against refugees and migrants in Macedonia, Serbia and Hungary" (July 2015); and Human Rights Watch, "Serbia: police abusing migrants, asylum seekers: beaten, extorted, shoved back across the border", 15 April 2015. The author also mentions that the main shortcomings of the Serbian asylum system are comprehensively presented in a document published on 12 October 2015 by the European Legal Network on Asylum and the European Database of Asylum Law, entitled "Desk research on the procedural and reception system for asylum seekers in Serbia".

[14] See European Council for Refugees and Exiles, "Crossing boundaries: the new asylum procedure at the border and restrictions to accessing protection in Hungary" (October 2015).

[15] The author mentions that once an individual has entered Serbian territory, in order to access the asylum process, he or she must register his or her intention of seeking asylum with the border police

surrounding woodland or abandoned buildings in harsh weather, which amounts to inhuman and degrading treatment.[16] Moreover, refugees are often victims of police brutality, forced to pay bribes, are verbally and physically abused, and are denied access to Serbian territory.[17]

3.6 The author also alleges that if returned to Serbia, she would be exposed to chain refoulement. She refers to numerous consistent and credible reports of routine pushbacks of asylum seekers to the former Yugoslav Republic of Macedonia without any consideration of their individual situation or the opportunity to claim asylum.[18] Article 33 of the Serbian Asylum Act incorporates the "safe third country" concept, whereby an application may be dismissed without reviewing the merits, unless the asylum seeker can prove that the country is not safe for him or her. That concept is applied systematically, as the list of safe third countries, which has not been updated since 2009, includes all States bordering Serbia and nearly all States that applicants must transit through in order to reach Serbia (including Greece, the former Yugoslav Republic of Macedonia[19] and Turkey). It is not based on criteria that establish whether the third country provides a fair and efficient asylum procedure and the availability of effective protection is not examined. She therefore risks being deported to the former Yugoslav Republic of Macedonia and then to Greece, without a substantive examination of her application. The systemic deficiencies in the Greek asylum system will put her at risk of chain deportation, violating the principle of non-refoulement. Ultimately, she is likely to end up in her country of origin, where she faces persecution.

3.7 Several international organizations have expressed their concern about the asylum procedure in Serbia and human rights violations. For example, in May 2015 the Committee against Torture urged Serbia to "continue and intensify its efforts to facilitate access to prompt and fair individualized asylum determination procedures in order to avoid the risk of refoulement" and "ensure that the asylum determination procedure provides for a substantive review of applications that respects the principle of non-refoulement, irrespective of whether the country of destination is considered safe".[20] It is also the official position of UNHCR that Serbia is not safe for asylum seekers and it recommends that asylum seekers should not be returned there.[21] The European Commission, in its progress report on Serbia in 2014, also pointed out the absence of effective access to the asylum procedure in Serbia and highlighted the need for a comprehensive reform of the asylum system.[22]

3.8 In Hungary, the author's asylum application was not examined on the merits because the authorities did not go beyond an assessment of the mere existence of Serbian international obligations and legislative provisions and did not check the actual practice in Serbia. That is not in line with the jurisprudence of the European Court, which noted in

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or at the nearest police station. Only with a certificate of registration can he or she be accepted into a reception centre and get material assistance, such as food and medical care (articles 39 and 40 of the Law on Asylum).

[16] See Amnesty International, "Europe's borderlands: violations against refugees and migrants in Macedonia, Serbia and Hungary", p. 43, and Médecins Sans Frontières, Serbia: Asylum seekers and migrants left in cold, 19 February 2015.

[17] See Human Rights Watch, "Serbia: police abusing migrants, asylum seekers: beaten, extorted, shoved back across the border" and Amnesty International, "Europe's borderlands: violations against refugees and migrants in Macedonia, Serbia and Hungary", p. 32.

[18] Ibid. Also see Human Rights Watch, Serbia: Police Abusing Migrants.

[19] In its latest assessment of the former Yugoslav Republic of Macedonia, the Office of the United Nations High Commissioner for Refugees (UNHCR) concludes that, owing to persistent gaps relating to access to the territory, to the asylum procedure and in the quality of decision-making, the country cannot be considered a "safe third country". See UNHCR, "The former Yugoslav Republic of Macedonia as a country of asylum" (August 2015).

[20] See CAT/C/SRB/CO/2, paras. 14–15.

[21] See "UNHCR urges Europe to change course on refugee crisis", 16 September 2015. See also interview with the UNHCR Hungarian spokesperson, 20 September 2015, available at https://refugeecrisisinhungary.wordpress.com/2015/09/20/crisis-and-chaos/, and UNHCR, "Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016" (May 2016).

[22] See European Commission, "Serbia progress report", October 2014.

M.S.S. v. Belgium and Greece that the mere existence of "domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment".[23] The Hungarian authorities completely disregarded the fact that the author was a victim of trafficking who had suffered serious abuse in Serbia, that she had been held in captivity, forced into prostitution and raped several times until she was abandoned by her captors in the forest at the Hungarian border and that, therefore, she had had no chance to ask for asylum in Serbia even if she had wanted to. The Hungarian authorities clearly did not conduct a thorough and individualized assessment, taking into consideration the personal circumstances of the author and the general situation prevailing in the country of return in the light of the jurisprudence of the European Court.[24]

3.9 The author is particularly vulnerable to inhuman and degrading treatment in Serbia as she is a single woman, a victim of trafficking and has suffered related mental and psychological health problems. She suffers from post-traumatic stress disorder and major depressive disorder.[25] She was raped several times and deprived of her liberty while in Serbia, facts that amount to a violation of article 7 of the Covenant according to the Committee's general comment No. 20. None of those factors were taken into consideration during the asylum procedure carried out by the Office of Immigration and Nationality or by the Budapest Administrative and Labour Court.

3.10 Different reports also show that victims of human trafficking are not sufficiently protected in Serbia.[26] Those who have been rescued can be subject to a lengthy and insensitive procedure that may result in secondary traumatization. Victims' identities are often not effectively protected by the authorities, which may put them in danger. The efforts of the authorities to identify victims of trafficking among asylum seekers are not considered adequate[27] and victims of rape are in a very difficult situation in Serbia owing to fear of reprisals from attackers and of humiliation in court. There is low public awareness of sexual harassment, the Government has not enforced the law effectively and the number of complaints filed by women remains low.[28]

3.11 With regard to article 13 of the Covenant, the author was denied the opportunity to submit reasons against her expulsion and to be represented before the Budapest Administrative and Labour Court. Following her interview with the Office of Immigration and Nationality, the minutes were not read back to her in order to give her the possibility to correct any errors, nor did the Office of Immigration and Nationality take into account the report by the Hungarian Helsinki Committee in making their decision, including the fact that the author and her sister had been victims of human trafficking and sexual abuse in Serbia. Although the author lodged an appeal within the legal seven-day period, the court decided her case without considering her submission owing to the delay of one week in the

[23] See *M.S.S. v. Belgium and Greece*, para. 353.

[24] The author also refers to the judgments of the European Court in *Neulinger and Shruk v. Switzerland*, Case No. 41615/07, 6 July 2010; *Sharifi and others v. Italy and Greece*, Case No. 16643/09, 21 October 2014; and *Tarakhel v. Switzerland*, Case No. 29217/12, 4 November 2014.

[25] The author is supported by the Cordelia Foundation, a Hungarian non-governmental organization working for the rehabilitation of victims of torture. The Cordelia Foundation issued a medical opinion on 28 April 2016, following her allegations of torture — sexual abuse and rape — in which it stated that the author was suffering from post-traumatic stress disorder and major depressive disorder. She still needed medication and psychotherapy and the Foundation further stated that: "the symptoms of the applicant and the result of the medical evaluation are in line with each other. The claimed forms of torture and traumas are normally those which may be experienced in the case of those arriving from the region of the applicant. I hereby state that, based on her symptoms, the applicant was a victim of seriously inhuman treatment, traumatisation and still continues to suffer from these experiences."

[26] See Group of Experts on Action against Trafficking in Human Beings, "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Serbia", (January 2014), para. 235.

[27] See United States Department of State, *Trafficking in Persons Report. July 2015*, available from www.state.gov/documents/organization/245365.pdf.

[28] See United States Department of State, "Country reports on human rights practices for 2015", available from https://2009-2017.state.gov/humanrightsreports/.

Office of Immigration and Nationality transmitting it to the court. She further notes that in the case of her sister, who received a negative decision on the same day and followed the same procedure, an appeal is still pending, as the Budapest Administrative and Labour Court did not take a decision within the eight days allowed and has therefore been able to take counsel's submission and the supporting documents into account.

3.12 The author has also been deprived of the ability to express her views on expulsion because the court denied her request for a personal hearing. That goes against the Committee's Views in *Ahani v. Canada*. In that case, the failure of the State party to provide the author with procedural protection on the basis that he had not demonstrated a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal and to have his submissions reviewed by a competent authority.[29]

3.13 As regards the alleged violation of article 2 (3) (a), read together with article 7 of the Covenant, the judicial review of the Budapest Administrative and Labour Court was not an effective remedy. The court did not consider the opinion of various international bodies, including UNHCR, regarding practical deficiencies in the Serbian asylum procedure, but instead relied on the existence of an asylum law to guarantee protection and on the fact that Serbia had ratified relevant conventions. Further, the Office of Immigration and Nationality did not forward counsel's submission to the court without delay and the court did not have time to consider the submission within the eight-day deadline. The eight-day deadline for the court to deliver a decision is in general insufficient for "a full and *ex-nunc* examination of both facts and points of law" as prescribed by European Union law.[30] Five or six working days are not enough for a judge to obtain crucial evidence, such as digested and translated country information or a medical/psychological expert opinion, or to arrange a personal hearing with a suitable interpreter.

3.14 The remedy is also ineffective because a personal hearing by the judge is not mandatory.[31] That is especially problematic because a hearing is a crucial safeguard in the judicial review procedure, when the first instance judge delivers a final, non-appealable decision. The unreasonably short time limit and the lack of a personal hearing can reduce the judicial review to a mere formality, in which the judge has no other information than the documents in the case file provided by the Office of Immigration and Nationality. Thus, in the light of the potentially irreversible harm that may result — directly or indirectly — from returning an applicant to a third country, the author's case was not subject to "rigorous scrutiny", in line with the principle established by the jurisprudence of the European Court.[32] By not considering the potential risk for the author of being subjected to inhuman and degrading treatment if returned to Serbia and the risk of further chain refoulement, the judicial review procedure before the Budapest Administrative and Labour Court is in breach of article 2 (3) (a) read in conjunction with article 7 of the Covenant.

State party's observations on admissibility and the merits

4.1 On 21 December 2016, the State party submitted its observations on admissibility and the merits of the communication. It claims that the minutes of the interview with the Office of Immigration and Nationality were signed by the author and, according to the minutes, they were read back to her, as demonstrated by the signatures of both the author and the interpreter. Moreover, during the hearing, the author was specifically asked if she had understood the interpreter and she replied in the affirmative, declaring that she had not faced communication problems. The burden of proof therefore lies with the author to rebut the documentary evidence of the case file in the administrative proceedings.

4.2 Regarding the decision of the Office of Immigration and Nationality of 15 April 2016, the author's submission concerning the minutes only arrived at the Office after the decision of the authority had already been delivered. The asylum authority was therefore

[29] *Ahani v. Canada* (CCPR/C/80/D/1051/2002), para. 10.8.

[30] See article 46 (3) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[31] See section 53 (4) of the Asylum Act.

[32] See European Court of Human Rights, *Chahal v. UK*, Case No. 22414/93, Judgment, 15 November 1996.

not in a position to consider it. Nevertheless, the documents were attached to the case file for consideration by the competent court when it was forwarded for judicial review by the refugee authority.

4.3 Section 93 (2) the Asylum Act provides that the Government shall be entitled to define the list of safe countries of origin and safe third countries in a governmental decree. According to section 2 of government decree No. 191/2015 (VII.21), candidate countries for European Union accession, including Serbia, belong to the group of safe third countries.

4.4 Regarding the author's appeal against the decision of the Office of Immigration and Nationality, the request for appeal was received by the asylum authority on 25 April 2016. Based on section 53 (3) of the Asylum Act, the Office of Immigration and Nationality immediately forwarded the request and the counter motion to the competent court for judicial review. The authority sent the case to the court on 28 April 2016. The preliminary submission of the author's legal representative was received by the Office of Immigration and Nationality on 29 April 2016 and, upon registration, was handed over to the administrator of the case on the same day. Owing to the short deadline available for the court proceedings, the document was registered and filed with the court on the next working day. That means that on 2 May 2016, the Office of Immigration and Nationality had forwarded the documents to the court. Given the volume of the preliminary documentation, the asylum authority forwarded the asylum application to the municipal administrative court and the labour court by post. Based on section 53 (3) of the Asylum Act, any requests for review must be filed with the asylum authorities, whereas supplementary information to an application shall be submitted directly to the court in accordance with section 93 (2) of the Civil Procedure Code. The failure of the author's legal representative may therefore not be attributed to the Office of Immigration and Nationality, as alleged by the author.

4.5 Referring to the final court decision, the alleged atrocities committed by human traffickers and suffered by the author are not relevant as to the decision taken by the asylum authority. The sole fact that the author did not turn to the Serbian authorities concerning the alleged criminal offences or that she failed to file a request for asylum does not mean that the Serbian authorities could not have provided her with protection against her persecution or the serious harm she had allegedly suffered.

4.6 As to the author's reference to the case of *Budina v. Russia* decided by the European Court, according to which any indifference or inaction on the part of the authorities may constitute inhuman and degrading treatment, those findings cannot be applied in the present communication, because the asylum authority had indeed conducted the proceedings and delivered its decision on the inadmissibility of the application on legal grounds.

4.7 With respect to the author's statement that her asylum application was not examined on the merits, the authority was not in a position to examine the merits as to whether the author had indeed been exposed to persecution or serious harm in her country of origin. At that stage of the procedure, the authority could only determine which member State was responsible for the examination of the asylum request.

4.8 Serbia is governed by the rule of law, has ratified several human rights treaties and has an asylum law based on the principle of non-refoulement. That act ensures that persons in situations similar or identical to the author's case will be recognized as refugees or receive temporary protection in Serbia. The author therefore had a real opportunity to submit a request for international protection in Serbia. However, she did not avail herself of that opportunity and still refuses to do so. Besides, according to the information available on Serbia, the institutional framework for the submission and consideration of asylum requests is assured. In addition, Serbia is a candidate country for European Union accession and in that context, it has officially stated that it accepts freedom, security and justice as part of the *acquis* of the European Union (as of 1 January 2016), including the part that guarantees high standards of international protection and constitutes the elements of the common European asylum system.

4.9 In relation to the author's reference to the official position of UNHCR and the European Commission in respect of Serbia, Opinion No. 1/2016 (21 March) of the Curia (the Supreme Court of Hungary) proclaims that the relevant European Union laws and their

modifications on the regulation of member States' legislative activity allow member States to decide on the list of safe third countries on an individual basis. According to section 3 (2) of government decree No. 191/2015 (VII.21), when a person requesting asylum, prior to arrival to the territory of Hungary, stayed or transited through a country which is on the list of the European Union of safe third countries, he or she may prove during the asylum procedure that he or she did not have any access to effective protection in that country, in line with section 2 (i) of the Asylum Act. In accordance with section 51 (11) of the Act, a person making such a statement may provide justification, immediately or not later than three days later, as to why a given country will not qualify as a safe country of origin or third country in the case in question.

4.10 During the asylum hearing, the author was informed that Serbia was considered a safe third country and that she was obliged to rebut that presumption within three days, as provided in the above-mentioned law. The author confirmed her understanding of the information given, but failed to make any statements in that regard, except for the untimely submission during the judicial proceedings. When deciding on the issue of inadmissibility, the authority may only consider whether the applicant resided in or travelled through the territory of a safe third country and whether he or she had a real chance of requesting effective protection in that specific country. Additionally, having regard to article 3.1 (b) of the readmission agreement between the European Community and Serbia, promulgated in decision No. 2007/819/EC of the Council of the European Union, the Hungarian asylum authority had no reason to assume that Serbia, as a candidate country for European Union accession, would not respect its obligations under an international treaty concluded with the European Union. Consequently, it has reasonably been established that in the author's case, Serbia qualifies as a safe third country which could approve her asylum request.

4.11 With respect to the allegations of chain deportation to Macedonia and Greece, significant developments have taken place in the Greek asylum system. Over the last five years, Greece has received significant amounts of financial and technical assistance from European Union funds for the development of its asylum system and for processing the backlog of cases.[33] Since October 2015, within the framework of the Greek "hotspot operation plan", the European Asylum Support Office has also deployed 136 experts from member States to Greece in order to support the Greek refugee service in the following areas: flow of information, registration, processing Dublin cases and in the area of identification of false documents. Recently, the European Union has allocated considerable amounts for improving the situation of asylum seekers in Greece, and there have been serious developments, in particular in housing conditions and capacities. Greece has also implemented the European Union *acquis*, which contains the elements of the common European asylum system, it has designed an asylum system (refugee service) and established an independent judicial review body.

4.12 As to the author's vulnerability, the author did not reveal that she was in need of assistance because of any physical or mental problems, either to the administrators of the asylum authority or to the social workers at the reception centre, even though she had the opportunity to do so. Furthermore, the author's statements to the Office of Immigration and Nationality contained inconsistencies, thereby casting doubt on her credibility.

4.13 Regarding the alleged violation of articles 13 and 2 (3) (a) of the Covenant, the author failed to avail herself of the opportunity to rebut the presumption of Serbia qualifying as safe third country, despite the fact that she had been informed about that legal requirement in a timely manner. Such statements were only revealed during the court proceedings. The Office of Immigration and Nationality has fulfilled its obligation to provide effective remedies, given that both the author's request for judicial review and her subsequent submissions were forwarded to the court on the first working day following receipt of the document.

4.14 Regarding the author's claim that the judge decided her case without taking into account her counsel's submissions, the court revised the decision of the asylum authority in

[33] The State party refers to the support allocated by the Asylum, Migration and Integration Fund, as well as emergency aid.

a so-called non-litigation procedure.[34] It therefore established the facts based on the content of the case file in the administrative proceedings.[35] Under section 53 (4) of the Asylum Act, the court shall deliver its decision on requests for judicial review based on the available documents in a non-litigation procedure and within eight days from receipt of the request for an appeal. The review of the court shall cover all the facts and legal aspects as known on the date of the decision. Personal hearings may take place, if deemed necessary, even without the request of the person concerned. In such cases, the decision as to whether a personal hearing should take place falls within the discretion of the judge. Even though the court did not deem it necessary to hear the author, the decision reached in the judicial review proceedings was based on the author's personal testimony submitted in the asylum procedure.

4.15 In the interest of providing protection for asylum seekers and to ensure respect for the principle of non-refoulement, section 51/A of the Asylum Act provides that if the safe country of origin or the safe third country refuse to take back the applicant, the asylum authority withdraws its decision and continues the procedure.

4.16 For all these reasons, the State party considers that the articles of the Covenant invoked by the author in the present communication have not been violated.

Author's comments on the State party's observations on admissibility and the merits

5.1 In her comments of 23 March 2017, the author maintains that the minutes of her interview with the Office of Immigration and Nationality were not read back to her and she was not informed of the statement to the effect that they had been read back. She signed the minutes without being aware of their exact content.

5.2 Regarding the State party's argument that she did not report any communication problems with the interpreter during the interview, mistakes in the minutes, even if unintended, are not always connected to miscommunication with the interpreter, but may occur during the translation of the asylum seeker's statements, or when the case officer is typing up the translation. That is the reason for the existence of a procedural safeguard in article 17 (3) of the recast so-called asylum procedures Directive of the European Union, according to which member States shall ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes a decision.[36]

5.3 The author submitted the corrections to the minutes to the Office of Immigration and Nationality office in the Bicske refugee camp on 13 April 2016, that is only two days after the interview. It is thus not her fault that the Office of Immigration and Nationality department in Budapest, which delivered the decision on 15 April 2016, did not receive the document on time. Minutes have the status of documentary evidence, and should have been taken into account by the Office of Immigration and Nationality.

5.4 Serbia cannot be considered as a safe third country for her owing to the violations she faced there. It is not enough to point to the existence of an asylum law, relevant ratified treaties and candidate status for European Union accession in order for a country to be considered safe for an asylum seeker, but "the general situation in another country, including the ability of its judicial authorities to provide protection, has to be established *proprio motu* by the competent domestic immigration authorities",[37] especially "when

[34] In accordance with sections 53 (4) and 65 (7) of the Asylum Act and Act III of 1952 on the Code of Civil Procedure, which were applied under section 4 of Act XVII of 2005 on Non-Contentious Administrative Proceedings and under the amendment to the Code of Civil Procedure.

[35] According to section 1 (2) of the Act on Non-Contentious Administrative Proceedings, only documentary evidence shall serve as a basis for decisions in non-litigation administrative proceedings.

[36] Directive 2013/32/EU of the European Parliament and of the Council.

[37] European Court of Human Rights, *J.K. and Others v. Sweden*, Case No. 59166/12, Judgment, 23 August 2016, para. 98.

information about such a risk is freely ascertainable from a wide number of sources".[38] As to the State party's statement that once returned to Serbia she could complain to the authorities for the violations she had suffered there, according to the reports she brought to the attention of the Committee, victims of human trafficking and rape are not sufficiently protected in Serbia (see para. 3.10 above).

5.5 The author cites a judgment of the European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary*,[39] considering that the core problems in her case are identical to the deficiencies revealed by the European Court. The Court found that the applicants' expulsion to Serbia exposed them to a real risk of being subjected to inhuman or degrading treatment, through a chain refoulement to Greece, where they would have faced inhuman and degrading conditions of reception.[40] The Court reiterated that according to the official position of UNHCR, Serbia was not a safe country for asylum seekers. The State party cannot simply rely on a safe third country list without taking into account the existing country information.

5.6 In theory, the State party has correctly applied the asylum procedure. However, various problems occurred in the author's case. Her appeal was decided less than 24 hours after the registration of her appeal by the court (see para. 2.8 above). Such a quick decision can be explained by the fact that the decision adopted in her case literally reproduces other decisions in cases where the Hungarian Helsinki Committee challenged the assumption that Serbia was a safe third country, only the author's name being changed. Also, even if her counsel sent his submission six days after the author received the negative decision, which was still within the seven-day deadline for appeal, the competent authority did not transmit his submission on time to the court and it therefore could not be taken into account in the judgment.

5.7 Regarding the State party's statement that she failed to rebut the presumption of Serbia being qualified as safe third country, although she was informed about the possibility of providing further evidence within a three-day deadline from the interview with the Office of Immigration and Nationality, she could not do so because she was held in captivity throughout her stay in Serbia and thus could not gather additional evidence. Her statements on her treatment in Serbia were sufficient evidence that Serbia was not a safe country for her,[41] but these facts were not even mentioned in the decision of the Office of Immigration and Nationality, nor were they considered by the court. The Hungarian authorities did not therefore examine with due diligence whether she indeed had a real chance to request effective protection.

5.8 As to the State party's allegation that she did not reveal her need for assistance based on physical and mental problems, her statement during the interview with the Office of Immigration and Nationality reflected the fact that she was a torture survivor who had undergone severe trauma, therefore falling within the category of especially vulnerable persons under section 2 (k) of the Asylum Act and article 21 of the Directive on reception

[38] European Court of Human Rights, *F.G. v. Sweden*, Case No. 43611/11, Judgment, 23 March 2016, para. 126.

[39] European Court of Human Rights, *Ilias and Ahmed v. Hungary*, Case No. 47287/15, Judgment, 14 March 2017. However, the case has been referred and is pending before the Grand Chamber.

[40] The author also refers to paragraph 120 of *Ilias and Ahmed v. Hungary*, according to which "[t]he Court observes that between January 2013 and July 2015 Serbia was not considered a safe third country by Hungary … This was so in accordance with reports of international institutions on the shortcomings of asylum proceedings in Serbia … However, the 2015 legislative change produced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings … The altered position of the Hungarian authorities in this matter begs the question whether it reflects a substantive improvement of the guarantees afforded to asylum-seekers in Serbia. However, no convincing explanation or reasons have been adduced by the Government for this reversal of attitude, especially in light of the reservations of the UNHCR and respected international human rights organisations expressed as late as December 2016 …".

[41] The author refers to the European Court's judgment in *M.S.S. v. Belgium and Greece*, para. 366, according to which once an applicant presents an arguable claim that he or she might be at risk of inhuman and degrading treatment and when information about such a risk is freely ascertainable from a wide number of sources, the burden of proof shifts to the authorities.

conditions.[42] The author contends that it is the duty of the authorities to identify vulnerable asylum seekers,[43] not her obligation to inform the Office of Immigration and Nationality that she qualifies as a person in need of special treatment, especially when her vulnerability is so obvious.

5.9 The author also informs the Committee that on 5 December 2016, she was granted refugee status, which rebuts the State party's assumption that her statements lacked credibility.

5.10 The author contests the State party's allegation that the Office of Immigration and Nationality forwarded her subsequent submissions to the court on the first working day following receipt of the document. The Office of Immigration and Nationality forwarded the submission only on 2 May 2016, which was not the next working day after it had received her submission on 29 April 2016. Finally, the State party has not advanced any argument demonstrating that the judicial review of her case was indeed effective.

State party's additional observations

6.1 On 26 April 2017, the State party stated that a second asylum procedure had been initiated on 27 June 2016 at the author's request. During her hearing, she had confirmed what she had said during her first interview as regards her route to Hungary,[44] but she had elaborated more on the reasons for her fleeing and had made some corrections with regard to her prior statements. The court decided that the order of the asylum authority should be set aside and the case be remitted to the asylum authority to conduct a new procedure.[45] It further considered that the asylum authority had infringed section 64 (4) of the Asylum Law, which states that on assessment of whether the applicant's fear of persecution is well-founded, it is of no relevance whether the applicant possesses racial, religious or political characteristics or a national affiliation that attracts persecution, provided that such a characteristic is attributed to the applicant by the persecutor. Thus, on 1 December 2016, a third asylum proceeding started ex officio on the basis of the above-mentioned court decision, as a result of which the author was granted asylum.

6.2 The author cannot therefore now qualify as a victim of the alleged infringement of her rights under articles 7 and 13 of the Covenant, as she is no longer at risk of being expelled to Serbia. In view thereof, it requests the Committee to reject the complaint as inadmissible.

Additional comments from the author

7.1 On 5 June 2017, the author insisted that it was not true that she had applied for asylum in Serbia, as the State party had declared. During her stay in Serbia, she was kept in captivity by human traffickers and did not have any contact with the Serbian authorities.

7.2 The author was granted refugee status only after she herself had submitted a second asylum application. Her application was finally declared admissible and examined on the merits. This was made possible only thanks to the interim measures ordered by the Committee, but did not result from any initiative by the authorities of the State party.

7.3 The fact that she is no longer at risk of being deported to Serbia does not in itself mean that there was no violation of the positive obligation of States to comply with article 7, read in conjunction with article 2 (3) (a) of the Covenant. According to the case law of the European Court, "in the domain of extradition and removal of migrants, eventual loss of victim status under Article 3 of the Convention cannot automatically and retrospectively dispense the State from its obligations under Article 13, in particular where it can be demonstrated that an applicant had an 'arguable' claim under Article 3 at a time he or she

[42] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2014 laying down standards for the reception of applicants for international protection (recast).

[43] She invokes article 22 of the recast Directive 2013/33/EU on reception conditions, article 24 of the recast Directive 2013/32/EU on asylum procedures and section 3 (1) of government decree No. 301/2007 (XI.9) on the implementation of Act LXXX of 2007 on asylum.

[44] The State party also affirms that the author sought international protection in Serbia.

[45] The State party does not give any details as to the dates or authorities that issued those decisions.

was under an imminent threat of removal".[46] The author therefore maintains her claim that the Hungarian authorities failed to fulfil their obligation to provide effective guarantees to protect her against arbitrary removal to Serbia resulting in a potential violation of article 7, read in conjunction with article 2 (3) (a) of the Covenant. Her complaint essentially concerns the shortcomings and serious procedural deficiencies of the administrative and judicial procedure leading to the final and enforceable decision on her return to Serbia.

7.4 Finally, the author maintains her complaint under article 13 of the Covenant, reiterating that her right to submit reasons against her expulsion and her right to be represented were breached during the asylum procedure. The fact that she was not in the end returned to Serbia has no bearing on the breach of this concrete right.

State party's additional observations

8.1 On 7 August 2017, the State party submitted additional observations. It reiterates its arguments and contests the author's statement that the positive evaluation of her second asylum application was the result of the interim measures ordered by the Committee. The authorities examined once more the events that took place in Serbia, despite some inconsistencies, and considered that owing to the humanitarian and human rights aspects of the case, it would not have been appropriate to have the author's case suspended, as requested by her legal representative, until a final decision was taken by the Committee. It was therefore in the author's best interest to reverse the previous decision, resume the procedure and obtain a new final decision.

8.2 The decision of inadmissibility in the first set of asylum proceedings was delivered on the basis of all the information available, without any procedural errors or violations of rights and in compliance with legal requirements, a fact that has also been confirmed by the competent court which carried out the review procedure.

Additional comments from the author

9.1 On 29 August 2017, the author reiterated her previous submissions and welcomed the State party's decision to re-examine her case following the interim measures granted by the Committee, although only after she had introduced her second asylum request on 27 June 2016. She was not invited to make a second request for asylum by the Office of Immigration and Nationality, hence she claims that the risk of exposure to inhuman and degrading treatment has not been remedied by the Office of Immigration and Nationality, in breach of article 2 (3) (a) of the Covenant. Therefore, the only reason for having her second application examined on the merits were the interim measures ordered by the Committee, not the actions of the Hungarian authorities.

9.2 The fact that she was not in the end returned to Serbia has no bearing on the breach of her right to submit reasons against her expulsion and to be represented before the competent authority, in violation of article 13 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required by article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee notes the author's statement that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in

[46] See European Court of Human Rights, *Kebe and others v. Ukraine*, Case No. 12552/12, Judgment, 12 January 2017, para. 89.

that connection, the Committee considers that it is not precluded from examining the communication under article 5 (2) (b) of the Optional Protocol.

10.4 The Committee notes that the author's second application for asylum was accepted and that on 5 December 2016 she was granted refugee status in Hungary. It also notes the State party's argument that the communication should therefore be declared inadmissible.

10.5 The Committee further notes the author's argument that despite the fact that she is no longer at risk of being deported to Serbia, she maintains her complaint under article 7, read alone and in conjunction with article 2 (3), and article 13 of the Covenant, regarding the alleged shortcomings and serious deficiencies that characterized the examination of her first application for asylum, which led to an enforceable decision to return her to Serbia.

10.6 The Committee takes due note of the author's allegations and highlights its concern as to the way the procedure was carried out and its direct consequences for the author, both in terms of her legal status and her personal and health conditions, from her arrival until she was granted refugee status in Hungary. The Committee also notes the favourable decision adopted on 5 December 2016 whereby the author was granted refugee status and was thus no longer at risk of removal. In view thereof, the Committee considers that the issues raised by the author concerning the alleged violations of article 7, read alone and in conjunction with article 2 (3), and of article 13 of the Covenant, through the rejection of her asylum application, have become moot in relation to article 1 of the Optional Protocol. Accordingly, in view of the circumstances of the case, those particular issues need not be further addressed in the context of the communication under review.

11. The Committee therefore decides that:

(a) The communication is inadmissible under article 1 of the Optional Protocol;

(b) The decision shall be transmitted to the State party and to the author.